

1 BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

2 NANCY KEENAN

3 STATE OF MONTANA

4 * * * * *

5	ELIZABETH A. WHALON,)	
6	Appellant,)	<u>DECISION AND ORDER</u>
7	vs.)	OSPI 173-89
8	TRUSTEES, ROOSEVELT COUNTY)	
9	SCHOOL DISTRICT NO. 64)	
10	Respondent.)	

11 * * * * *

12 Appellant Elizabeth Whalon (hereinafter "Whalon") was a non-
13 tenured teacher at Bainville School. On April 11, 1989,
14 Respondent Bainville School Board (hereinafter "the Board"), voted
15 to nonrenew Whalon. Whalon requested reasons for her nonrenewal
16 by letter dated April 17, 1989. The Board provided her with the
17 reason in a letter dated April 19, 1989, which stated:

18 The reason for the decision was a failure to
19 secure proper and necessary teacher
 certification in a timely fashion as required
 by law.

20 On May 3, 1989, Whalon filed an appeal with the Roosevelt
21 County Superintendent of Schools. The County Superintendent
22 requested and received briefs from both parties and issued an
23 Order on July 10, 1989, affirming the decision of the Board to
24 terminate the employment status of Whalon and dismissing the
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1 appeal. Whalon appealed the Order of the County Superintendent
2 to the State Superintendent on August 4, 1989. The parties filed
3 briefs and oral argument was heard on November 28, 1989.

4 Having reviewed the complete record, the briefs of the
5 parties, and having heard oral argument, this State Superintendent
6 now makes the following decision.

7 DECISION AND ORDER

8 The State Superintendent of Public Instruction has
9 jurisdiction of this appeal under Section 20-3-107(1)(a), MCA.

10 A nontenured teacher has very limited rights to appeal his/her
11 nonrenewal of employment by the board of trustees of a school
12 district. In accordance with Section 20-4-206, MCA, the
13 nontenured teacher may appeal if the board fails to respond to a
14 timely request for written reasons. In addition, the nonrenewed
15 nontenured teacher also has the right to an evidentiary hearing
16 before the County Superintendent of Schools to prove that the
17 school board abused its discretion in reaching its decision not
18 to renew the teacher's contract.

19 This matter is remanded to the County Superintendent of
20 Schools of Roosevelt County with instructions to hold an
21 evidentiary hearing in accordance with Rules of Procedure for all
22 School Controversy Contested Cases, 10.6.101 et seq.,
23 Administrative Rules of Montana, and issue a final order in
24 accordance with the decision in this appeal. The County
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1 Superintendent of Schools shall admit evidence relevant to
2 deciding the following issue: Whether the Board of Trustees of
3 Roosevelt County School District No. 64 abused its discretion when
4 it decided not to renew Whalon's teaching contract for the reason
5 stated in its letter of April 19, 1989.

6 MEMORANDUM OPINION

7 The Montana Supreme Court, in Bridger Education Association
8 v. Board of Trustees, 41 St. Rep. 533 678 P.2d 659 (1984),
9 concluded the legislature created a legal privilege for
10 nontenured teachers when it amended Section 20-4-206, MCA,
11 requiring that the board of trustees furnish a written
12 statement of the reasons for nonrenewal within 10 days of the
13 receipt of a written request from the nonrenewed teacher. The
14 Court concluded the legislature "must have intended to grant
15 something of meaning when the requirement for stating reasons,
16 upon request, was written into the statute. The specified
17 reason 'to find a better teacher' serves no purpose."

18 Since the Bridger decision, school districts have argued
19 that a nonrenewed nontenured teacher is not entitled to an
20 **evidentiary hearing** before the County Superintendent under the
21 Rules of School Controversy promulgated by the State
22 Superintendent and set forth in Title 10, Chapter 6, subchapter
23 1, of the Administrative Rules of Montana (ARM). County
24 Superintendents and the former State Superintendent accepted
25 jurisdiction over appeals from nonrenewed nontenured teachers for

1 the purposes of determining whether a board of trustees gave the
2 teacher "written reasons" upon a timely request and whether the
3 given reasons meet the "Bridger test." However, County
4 Superintendents have held and the former State Superintendent
5 affirmed that a nonrenewed nontenured teacher is not entitled to
6 present evidence in accordance with 10.6.116, ARM, to test the
7 veracity of the stated reasons. Wanty v. Trustees, Carbon County
8 School District No. 34-3, 5 Ed.Law 10 (OSPI 1986) and Schulte v.
9 School District No. 24, 5 Ed. Law 13 (OSPI 1986). Thus, there
10 has been created an anomaly--a contested case procedure where the
11 parties cannot present evidence.

12 The main argument of respondent boards of trustees is based
13 on the conclusion that permitting nonrenewed nontenured teachers
14 a right to an evidentiary hearing is akin to granting "instant
15 tenure." The nonrenewed nontenured teachers argue that clearly
16 the legislature did not intend that a board of trustees could
17 rely on its creative imagination to "concoct" reasons for its
18 decision not to renew a nontenured teacher's contract.

19 This State Superintendent is persuaded that it was not the
20 intent of the legislature to insulate the reasons required under
21 Section 20-4-206, MCA, from all scrutiny. Likewise, she is
22 persuaded that the legislature did not intend to require a board
23 of trustees to prove "good cause" for nonrenewal of a nontenured
24 teacher's contract. As the Board argues, that would create
25 "instant tenure." Are these the only alternatives? No. This

1 Superintendent believes there is another alternative.

2 One of the official duties of the board of trustees is the
3 employment of teachers for the district. Section 20-3-324(1), MCA
4 states:

5 As prescribed elsewhere in this title, the trustees of
6 each district shall:

7 (1) employ or dismiss a teacher, principal, or
8 other assistant upon the recommendation of the
9 district superintendent, the county high school
10 principal, or other principal as the board
considers necessary, accepting or rejecting any
recommendation as the trustees in their sole
discretion determine, in accordance with the
provisions of Title 20, chapter 4.

11 In addition, a board's employment decisions must comply with
12 the specific requirements of Title 20, Chapter 4, Part 2, MCA.
13 Section 20-4-206 applies to the nonrenewal of a nontenured
14 teacher's contract. Under these statutes the board of trustees
15 of a school district is permitted to exercise its discretion in
16 making nontenured teacher employment decisions. However, even
17 discretion has its limits. The Montana Supreme Court discussed
18 abuse of discretion in Jeppeson v. State of Montana, Department
19 of State Lands, 40 St. Rptr. 1272, 667 P.2d 428 (1983), and
20 stated:

21 At the outset, we reemphasize that the discretionary
22 powers vested in the respondent department are broad in
scope. Abuse of discretion, on the other hand, is not

23 subject to as broad an interpretation. This Court has
24 held that abuse of discretion involves: "not merely an
error in judgment, but perversity of will, prejudice,
25 passion, or moral delinquency, but it does not necessarily
imply wrong-doing or a breach of trust, or import bad

1 faith; it conveys, rather the idea of acting beyond the
2 limit of discretion; the disregard of the evidence
3 adduced; the basing of a decision upon incompetent or
4 insufficient evidence; an exercise of discretion to an end
or purpose not justified by, and clearly against, reason
and evidence; a clear error in law in the circumstances.
[Citations omitted.]

5 ID at 1277 (citing Taylor v. County Commissioners, 128 Mont.102,
6 111 and 112 (1954) with approval.)

7 This Superintendent believes a board of trustees has broad
8 discretionary power when deciding not to renew a nontenured
9 teacher's contract. She is also of the opinion that a board of
10 trustees of a school district can abuse its discretionary power.
11 It is her opinion that a nonrenewed nontenured teacher has a right
12 to an evidentiary hearing to prove that the board of trustees
13 abused its discretion. This is a heavy burden.

14 In regard to the board's decision not to renew the contract
15 of a nontenured teacher, the board is entitled to the disputable
16 presumption that it acted with discretion. In an appeal by a
17 nontenured teacher, the board of trustees is not required to prove
18 that it had "good cause" for the nonrenewal. The teacher has the
19 burden of proving that the board abused its discretion in deciding
20 not to renew the nontenured teacher's contract.

21 This Superintendent believes that providing a nonrenewed
22 nontenured teacher the opportunity to prove that a board of
23 trustees abused its discretion will put boards of trustees on
24 notice that they are not free to make arbitrary and capricious
25 decisions. Such a hearing will help insure that the reasons relied

1 upon by a board to decide not to renew a nontenured
2 teacher's contract do, in fact, inform the teacher of "the
3 undesirable qualities which merit a refusal to enter into a
4 further contract."

5 The Supreme Court in Jeppeson used the following phrases to
6 describe abuse of discretion: "the disregard of the **evidence**
7 adduced; the basing of a decision upon incompetent or insufficient
8 **evidence**; an exercise of discretion to an end or purpose not
9 justified by, and clearly against, reason and **evidence**; a clear
10 error in law in the **circumstances**." (Emphasis added.) Only through
11 a hearing process that admits relevant evidence will the trier of
12 fact be able to decide whether a board of trustees abused its
13 discretion in not renewing the contract of a nontenured teacher.

14 The remaining issue in this appeal is whether the hearing
15 should be held before a Court of competent jurisdiction or a
16 County Superintendent in accordance with rules adopted by the
17 State Superintendent under Section 20-3-107, MCA.

18 Easton v. Trustees, Missoula County School District No. 11,
19 5 Ed. Law 190 (OSPI 1986); and Cummings v. Missoula County
20 Trustees, 6 Ed. Law 18 (OSPI 1987) have been cited for the
21 contention that a nontenured teacher has "recourse in the
22 judicial forum" if the teacher believes the reasons given the
23 board are false. It is not prudent to require an appellant to
24 file an action and pursue a remedy in two separate forums,
25 administrative and judicial, to obtain a complete remedy. A

1 nontenured teacher would have to file an appeal with the County
2 Superintendent to determine whether or not the written reasons
3 met the "Bridger test" as well as a writ in district court to
4 have the court determine whether reasons given by the board were
5 true.

6 Section 20-3-107(3), MCA, states:

7 In order to establish a uniform method of hearing and
8 determining matters of controversy arising under this
9 title, the superintendent of public instruction shall
10 prescribe and enforce rules of practice and regulations
11 for the conduct of hearings and the determination of
12 appeals by all school officials of the state.

13 In addressing the jurisdiction of a County Superintendent of
14 Schools, the Montana Supreme Court held that under Section 20-3-
15 210, MCA, the County Superintendent must hear and decide all
16 matters of controversy arising as a result of decisions of the
17 board of trustees. The court held that as a general rule a
18 claimant in the school system must exhaust administrative remedies
19 before filing a complaint or petition in district Court. This
20 general rules has three limited exceptions. These exceptions are
21 situations where state agencies have been directly granted primary
22 jurisdiction, where the matter is governed by a specific statute
23 or where the board has acted without or in
24 excess of its jurisdiction. Canyon Creek Education Assoc. v.
25 Board of Trustees, Yellowstone County School District No. 4,
47 St. Rptr. 93 (1990), (explaining Throssell v. Board of Trustees
of Gallatin County School District, 45 St. Rep. 1228 (1988)).

1 This State Superintendent believes that an appeal by a
2 nontenured teacher should be heard and decided by a County
3 Superintendent in accordance with rules controversy adopted under
4 20-3-107, MCA. She believes the legislature intended to establish
5 a uniform method of hearing and deciding school controversies.
6 There is no statutory grant of jurisdiction to a District Court
7 to hear a nontenured teacher's allegation that the reasons given
8 by a board of trustees for nonrenewal are false. In order to get
9 a hearing before a district court, the nontenured teacher would
10 have to rely on an extraordinary writ and contend that there is
11 not a plain, speedy, and adequate remedy in the ordinary course
12 of law.

13 In summary, this decision does not grant "instant tenure" to
14 nontenured teachers. It does provide an opportunity for an
15 evidentiary hearing before a county superintendent at which the
16 nonrenewed nontenured teacher has the burden of proving that the
17 board of trustees abused its discretion in arriving at the
18 decision to not renew the teacher's contract. This is clearly
19 different than in an appeal of a board decision by a terminated
20 tenured teacher. When a tenured teacher appeals the board of
21 trustees termination decision, the board, not the teacher, has
22 the burden of proving that it had "good cause" for the
23 termination. The nontenured teacher has the burden of proof in
24 an abuse of discretion hearing.

1 DATED this 23 day of March, 1990.

2
3 Nancy Keenan
4 NANCY KEENAN

5 10.6.128 APPELLATE PROCEDURE - DECISION (1) The decision and
6 order of the superintendent of public instruction shall be final,
7 subject to the proper legal remedies in the state/federal courts.
Such proceedings shall be commenced no later than 60 day after the
date of the decision and order of the state superintendent of
public instruction.

8 CERTIFICATE OF SERVICE

9 THIS IS TO CERTIFY that on this 23rd day of March, 1990, a
10 true and exact copy of the foregoing DECISION AND ORDER was
mailed, postage prepaid, to the following:

11 Charles E. Erdmann
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